

Decision **PROPOSED DECISION OF COMMISSIONER PICKER**  
**(Mailed 7/28/2015)****BEFORE THE PUBLIC UTILITIES COMMISSION OF THE STATE OF CALIFORNIA**

Order Instituting Expedited Rulemaking to Consider Repeal of General Order 105-A, General Order 106, and General Order 144-A.

Rulemaking 15-07-025  
(Filed July 23, 2015)

**DECISION REPEALING GENERAL ORDERS****Summary**

This decision repeals three outdated General Orders that are no longer necessary by operation of laws and regulations passed subsequent to these General Orders. It does so through use of a new procedure that the Commission has employed on a pilot program basis in order to evaluate its potential for streamlining some of our existing procedures and for reducing the time and expense of public participation in certain quasi-legislative rulemaking proceedings.

**1. Purpose of Proceeding**

We opened this expedited rulemaking to consider the proposed repeal of three General Orders (GO): GO 105-A, adopted in 1959, which sets forth rules for the filing of tariffs reflecting rates charged by air transportation companies for intrastate service; GO 144-A, adopted in 1978, which sets forth rules concerning compensation for airline passengers with confirmed boarding passes who are denied boarding; and GO 106, adopted in 1958, which sets forth rules concerning chemical toilets in railroad cabooses.

## **2. Background**

On January 28, 2015, Commission staff (staff) released a Solicitation for Input (SFI)<sup>1</sup> inviting informal input from the public into what revisions, if any, should be made to certain GOs and utility reporting requirements that appear out-of-date and appropriate for revision or deletion due to changes in technology and markets, changes in state and federal jurisdiction, changes in the Commission's mission, and other changes in circumstances due to the passage of time. In the SFI, staff identified dozens of utility reporting requirements and other rules and requirements in Commission GOs that appeared ripe for updating or revision.

Among the GOs staff proposed repealing were GO 105-A and GO 144-A. Staff also proposed that GO 106 be reviewed for relevance and possibly repealed.

The SFI was published on the Commission website, and was distributed to the service lists from the following proceedings: investor-owned utility rate cases, Application (A.) 13-11-003, A.13-12-012, and A.12-11-009; water action plan Rulemaking (R.) 11-11-008; residential rate design Order Instituting Rulemaking, R.12-06-013; electric and communications infrastructure safety rulemakings, R.08-11-005 and R.14-08-012; California High Cost Fund-A, R.11-11-007; and communications service quality, R.11-12-001.

Informal comments on the SFI were received on March 27, 2015, and reply comments on April 17, 2015. The following entities submitted comments: AT&T California; California Water Association; California Cable & Telecommunications Association; Consumer Federation of California; Frontier Communications

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<sup>1</sup> The SFI can be found at: <http://www.cpuc.ca.gov/PUC/hottopics/7other/sfi.htm>

Company of California; Pacific Gas and Electric Company; Southern California Edison Company; Southern California Gas Company; San Diego Gas & Electric Company; The Utility Reform Network (TURN); The Small Local Exchange Carriers (Small LECs); and Verizon Communications.

No informal comments were submitted concerning the staff proposals regarding GO 105-A, GO 144-A, or GO 106.

Based upon the results of the informal consultation process, the Commission determined it appropriate to proceed with repealing GO 105-A, GO 144-A, and GO 106 on an expedited basis. As a result, an Order Instituting Expedited Rulemaking (OIR) was approved by the Commission, a Proposed Decision was issued on July 28, 2015 with the issuance of the OIR, and an expedited schedule was set for receipt of further public comment on the OIR, associated Proposed Decision, and the SFI pilot program process. The OIR made persons and organizations that previously provided informal comments on the SFI through the SFI Listserv parties to the OIR proceeding without the necessity of their filing any further motions or pleadings and their previous informal comments were incorporated into the record of the OIR. The additional comments on the OIR and Proposed Decision and SFI pilot program process were due 20 days following issuance of the OIR and reply comments five days thereafter.

Additional comments were filed and have been considered by the assigned Commissioner.

**3. Repeal of General Orders****3.1. General Orders 105-A and 144-A**

The Federal Airline Deregulation Act of 1978 (the Act) preempts states from regulating airline prices, routes, and service. The Act's preemption provision, 49 U.S.C § 41713, provides in relevant part:

(b) Preemption.

(1) Except as provided in this subsection, a State, political subdivision of a State, or political authority of at least 2 States may not enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation under this subpart.

GO 105-A requires airlines to file their rates with the Commission, and GO 144-A requires airlines to pay compensation to passengers under certain circumstances. Both of these GOs are "...related to a price, route or service of an air carrier" as provided in 49 U.S.C. § 41713(b)(1) and are therefore preempted by the Act.

In addition, GO 144-A applies, by its own terms, to airlines "...certificated pursuant to Division 1, Part 2, Chapter 4, of the Public Utilities Code[.]" This portion of the Public Utilities Code has been repealed, and the Commission no longer grants operating authority to airlines.

**3.2. General Order 106**

GO 106 sets forth rules for chemical toilets in railroad cabooses in considerable detail, including, e.g.: the construction of the toilet enclosure; the finish of the walls, ceilings, and floors; and the presence of toilet paper and a toilet paper holder.

The use of railroad cabooses has declined sharply as technological advancements in train-mounted devices, trackside monitoring, and train control

electronics have reduced the size of train crews, curtailing the reach and continued relevance of the caboose toilet rules in GO 106. Furthermore, employee toilet facilities are regulated under the authority of the California Department of Industrial Relations under Cal/OSHA Title 8 of the California Code of Regulations.

#### **4. Discussion**

As a result of the SFI process, which allowed interested parties to file informal comments with staff prior to the initiation of this rulemaking, we received no opposition to the proposed repeal of GOs 105-A, 144-A or 106. Consequently, we will proceed on an expedited basis with their repeal.

GO 105-A and GO 144-A pertain to intrastate airline prices and services preempted by the Federal Airline Deregulation Act of 1978. Under California Constitution, Article III, Section 3.5, the Commission is precluded from declaring a statute unenforceable or refusing to enforce a statute on the basis of it being unconstitutional unless an appellate court has made a determination that such statute is unconstitutional. In *Hughes Air Corp v. Pub. Util. Comm'n* 644 F.2d 1334 (1981) the U.S. Court of Appeals for the 9th Circuit held that the Commission and the State of California are precluded from regulating intrastate airlines by the federal Aviation Deregulation Act of 1978. The 9th Circuit is an appellate court. As a result, the California Constitution, Article III, Section 3.5 raises no bar to Commission acknowledgement of federal preemption of intrastate airline regulation. GOs 105-A and 144-A have not been enforced for decades. The Commission thus no longer has any jurisdiction or justification for retaining GOs 105-A or 144-A.

The use of railroad cabooses has declined sharply due to technological advancements other factors reducing the justification and need for Commission

regulation of toilet facilities in cabooses. In addition, employee toilet facilities are regulated under the authority of the California Department of Industrial Relations. There is thus no further justification or need for Commission regulation of toilet facilities in cabooses.

Repealing GOs 105-A and 144-A will have no effect on safety as they pertain to airline tariffs and terms of service and do not affect safety. Repealing GO 106 will have no effect on safety, as employee toilet facilities have few if any safety impacts and, in any event, will continue to be subject to the authority of the California Department of Industrial Relations.

Accordingly, we hereby repeal GO 105-A, GO 144-A, and GO 106, as proposed.

## **5. Comments on Proposed Decision**

The proposed decision of Commissioner Picker in this matter was mailed to parties in accordance with Section 311 of the Public Utilities Code and comments were allowed under Rule 14.3 of the Commission's Rules of Practice and Procedure. Comments were filed by the Commission's Office of Ratepayer Advocates (ORA). There were no reply comments. Although ORA did not object to repealing GO 105-A, GO 106, and GO 144-A, ORA raised concerns and made suggestions regarding the SFI process itself. ORA argued that the Commission should cast a wide net when seeking informal comment prior to an OIR, including at minimum the service list used to promulgate the rule and the Public Advisor's suggestions for additional interested parties. In addition, ORA argued that, pursuant to Public Utilities Code Section 1708, the Commission must use the same process to repeal a rule that it used to promulgate the rule. Finally, ORA argued that the Commission should not give the same weight to

informal comments that it gives to pleadings. ORA has provided wise input regarding the SFI process that we will take into consideration for future efforts.

## **6. Categorization and Need for Hearing**

The category of this proceeding is quasi-legislative and evidentiary hearings are not needed in this proceeding.

## **7. Assignment of Proceeding**

Michael Picker is the assigned Commissioner in this proceeding.

## **Findings of Fact**

1. Both General Order (GO) 105-A and GO 144-A are "...related to a price, route or service of an air carrier."
2. GO 144-A applies to air carriers certificated pursuant to Division 1, Part 2, Chapter 4, of the Public Utilities Code, which has been repealed. GOs 105-A and 144-A have not been enforced for decades.
3. The Commission no longer has any justification for retaining GOs 105-A or 144-A.
4. The use of railroad cabooses has declined sharply as technological advancements in train-mounted devices, trackside monitoring and train control electronics have reduced the size of train crews.
5. Responsibility for employee toilet facilities rests with the California Department of Industrial Relations under Cal/OSHA Title 8 of the California Code of Regulations.
6. There is no further justification or need for Commission regulation of toilet facilities in cabooses.
7. Repealing GOs 105-A and 144-A will have no effect on safety, as they pertain to airline tariffs and terms of service and do not affect safety.

8. Repealing GO 106 will have no effect on safety, as railroad cabooses have fallen into disuse, employee toilet facilities have few if any safety impacts and, in any event, will continue to be subject to the authority of the California Department of Industrial Relations.

### **Conclusions of Law**

1. Both GO 105-A and GO 144-A are "...related to a price, route or service of an air carrier" as provided in 49 U.S.C. § 41713(b)(1) and are therefore preempted by the Act.

2. The California Legislature eliminated the class of airline carriers subject to General Order 144-A when it repealed Division 1, Part 2, Chapter 4, of the Public Utilities Code.

3. In *Hughes Air Corp v. Pub. Util. Comm'n* 644 F.2d 1334 (1981) the U.S. Court of Appeals for the 9<sup>th</sup> Circuit held that the Commission and the State of California are precluded from regulating intrastate airlines by the federal Aviation Deregulation Act of 1978.

4. As a result of the 9<sup>th</sup> Circuit's decision in *Hughes Air Corp v. Pub. Util. Comm'n*, 644 F.2d 1334 (1981), California Constitution, Article III, Section 3.5 raises no bar to Commission acknowledgement of federal preemption of intrastate airline regulation.

5. The Commission no longer has any jurisdiction to enforce GOs 105-A or 144-A.

6. GO 105-A should be repealed.

7. GO 144-A should be repealed.

8. GO 106 should be repealed.



**O R D E R**

**IT IS ORDERED** that:

1. General Order 105-A, General Order 106, and General Order 144-A are repealed.
2. Rulemaking 15-07-025 is closed.

This order is effective today.

Dated \_\_\_\_\_, at San Francisco, California.